

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ZHAOYIN WANG
Plaintiff,

v.

BETA PHARMA, INC., DON ZHANG,
AND ZHEJIANG BETA PHARMA
CO., LTD.,
Defendants.

Civil Action No. 3:14-cv-01790-VLB

FEBRUARY 4, 2015

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Defendants move to dismiss several counts of plaintiff's complaint pursuant to Fed.R.Civ.P. 12(b)(6). Specifically, defendants argue that the Third, Fourth, Fifth, Sixth, Seventh, and Eighth Counts of the complaint should be dismissed under the economic loss doctrine; that the Fourth and Seventh Counts should be dismissed for failure to plead fraud with particularity; and that the Fifth and Eighth Counts should be dismissed for failure to allege a fiduciary duty.

As explained more fully below, defendants' motion lacks merit. First, plaintiff's tort claims against defendants Beta Pharma and Zhang are not barred by the economic loss doctrine because they implicate misrepresentations and omissions made by defendants to plaintiff prior to formation of the parties' agreement, which statements and omissions induced plaintiff to enter into a business relationship with defendants in the first instance. Second, plaintiff has alleged his fraudulent misrepresentation claims against defendants Beta Pharma and Zhang with the particularity required by Fed.R.Civ.P. 9(b). Finally, plaintiff has alleged sufficient facts to demonstrate that defendants owed a fiduciary duty to

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plaintiff. Accordingly, plaintiff has pled facts entitling him to relief, and defendants' motion should be denied.

I. BACKGROUND

As alleged in plaintiff's complaint, this case arises from the business relationship between plaintiff, Zhaoyin Wang and the defendants. Plaintiff has brought claims for breach of contract, negligent misrepresentation, fraudulent misrepresentation, breach of fiduciary duty, and declaratory judgment. In particular, plaintiff alleges that Beta Pharma, Inc., ("Beta Pharma") is a privately owned Delaware corporation with a principal place of business in Branford, Connecticut as of the time of the transactions alleged herein and until January, 2013. Beta Pharma is in the business of researching, developing and marketing pharmaceuticals. Beta Pharma continues to do business in Branford, but represents that its principal place of business is now in New Jersey. At all times relevant to this action, defendant Zhang has been the majority stockholder and President of Beta Pharma.

In approximately 2002 and 2003, Beta Pharma scientists invented, patented and synthesized Icotinib, a molecule that showed promise as a treatment for non-small cell lung cancer. Beta Pharma's development work on Icotinib continued thereafter. In approximately 2002, Beta Pharma joined with other investors to form a joint venture to develop, test and market Icotinib in the People's Republic of China. These joint venturers formed Zhejiang Beta Pharma Co. Ltd., ("ZBP"), a privately owned corporation organized under the laws of China. Beta Pharma contributed the patent rights to Icotinib to the joint venture, and received in exchange a 45% interest in ZBP. Defendant Zhang is and has been Vice-President of ZBP and a director thereof.

Plaintiff, Zhaoyin Wang, is a medicinal chemist who earned his Ph.D. at Yale and now resides in Quebec, Canada. On March 26, 2010, when defendant Beta Pharma's principal place of business was in Connecticut, it began negotiations with

plaintiff Wang to enter into a partnership agreement. At that time, defendants made several false and misleading statements to Wang in order to convince and induce him into entering a partnership agreement with plaintiff. Under the agreement, plaintiff was to go into business with Beta Pharma, as well as to perform professional services for the company.

When defendants made these inducing statements, they knew, or should have known that they were patently false. Additionally, to further persuade plaintiff to enter into a business agreement with them, Beta Pharma and Zhang failed to disclose material facts and information to plaintiff that would have impacted his decision to enter into any agreement with defendants.¹

Under the parties' agreement, plaintiff was to receive valuable consideration including a salary of 850,000 Chinese RMB yuan per year (about U.S. \$140,000 per year), 2 million shares or about 2% of the stock in BP, and 3 million shares or 1% of the stock in ZBP.

In reliance on the promises contained in the Partnership Agreement, as well as defendants' false and misleading statements and material omissions, plaintiff (a) formed Beta Pharma Canada, ("BPC") a Canadian corporation owned 51% by plaintiff and 49% by defendant Zhang; (b) invested approximately \$300,000 of his funds into setting up and operating the BPC laboratory; (c) worked for BPC full time for approximately 3 years, performing drug discovery research and developing new medicinal molecules for treatment of cancer and inflammatory disease; (d) applied for patents for the new molecules he discovered while working at BPC; (e) worked with BP to develop Icotinib and reinforce the Icotinib patent; and (f) performed other work and did other business to advance Beta Pharma, BetaPharma Canada and Zhang; (g) turned down other opportunities to work elsewhere; (h) continued to hold

¹ The specific factual allegations of plaintiff's complaint in this regard will be discussed more fully, infra.

his ZBP shares with the expectation that he would be able to realize their value, and their increasing value; (i) continued to work for Beta Pharma Canada for the benefit of defendants Beta Pharma and Zhang; and (j) deferred taking legal action against defendants.

Defendants, however, failed to pay plaintiff Wang his salary under the Agreement, discontinued funding for Beta Pharma Canada, failed to deliver promised shares of Beta Pharma to plaintiff; failed to register the shares of ZBP in plaintiff's name on the records of ZBP in China so that plaintiff could participate in the planned initial public offering of ZBP shares in China; and failed to cause plaintiff to participate in the anticipated ZBP public offering in China – all in violation in the Agreement and applicable law.

As redress, plaintiff seeks, inter alia, compensatory damages, as well as punitive damages on account of defendants' fraud and breach of fiduciary duty.

II. STANDARD

"The function of a motion to dismiss under Rule 12(b)(6) is to determine whether the plaintiff has stated a legally cognizable claim that, if proven, would entitle her to relief." Abuhamdan v. Blyth, 9 F.Supp.3d 175, 187 (D.Conn. 2014) (Shea, J.). Thus, to survive a motion to dismiss, a plaintiff must allege sufficient facts, which are accepted as true, to "state a claim to relief that is plausible on its face." Id. (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Gagnon v. East Haven Board of Education, 29 F.Supp.3d 79, 82 (D.Conn. 2014) (Hall, J.) (quoting Iqbal, 556 U.S. at 678).

A complaint will not be dismissed if it states the grounds upon which a plaintiff's claim rests "through factual allegations sufficient to raise a right to relief above the speculative level." Abuhamdan, 9 F.Supp.3d at 187 (quoting Kleinman v.

Elan Corporation, plc, 706 F.3d 145, 152 (2d Cir. 2013)). “The function of a motion to dismiss is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof.” Traylor v. Awwa, No. 3:11cv00132 (AWT), 2014 WL 555358 (D.Conn. Feb. 10, 2014) (Thompson, J.) (quoting Mytych v. May Dept. Store Co., 34 F.Supp.2d 130, 131 (D.Conn. 1999) (internal quotation marks and citation omitted). “The issue on a motion to dismiss is not whether the plaintiff will prevail, but whether the plaintiff is entitled to offer evidence to support his claims.” Id. (quoting United States v. Yale New Haven Hospital, 727 F.Supp. 784, 786 (D.Conn. 1990)).

In short, “[t]he plausibility standard does not impose an across-the-board, heightened fact pleading standard.” Simoneau v. Stryker Corp., No. 3:13cv1200(JCH), 2014 WL 1289426 (D.Conn. March 31, 2014) (Hall, J.) (quoting Boykin v. KeyCorp, 521 F.3d 202, 213 (2d Cir. 2008)). “Rather, the standard is ‘flexible,’ obliging the plaintiff ‘to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible.’” Id. (quoting Boykin, 521 F.3d at 213).

“In deciding a motion to dismiss under Rule 12(b)(6), the Court accepts as true all factual allegations in the complaint and draws all reasonable inferences in the plaintiff’s favor.” Abuhamdan, 9 F.Supp.3d at 187 (citing Selevan v. N.Y. Thruway Auth., 584 F.3d 82, 95 (2d Cir. 2009)). “‘Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements,’ however are not entitled to the assumption of truth.” Id. (quoting Iqbal, 556 U.S. at 678).

III. ARGUMENT

A. Plaintiff’s tort claims are not barred by the economic loss doctrine.

In addition to his breach of contract claims against defendants Beta Pharma and Zhang, plaintiff has brought tort claims against these defendants sounding in negligent misrepresentation, fraudulent misrepresentation and breach of fiduciary

duty. Defendants argue that these tort counts should be dismissed because they are barred by the economic loss doctrine. However, because these counts are based on, and arise from, defendants' tortious conduct prior to, and surrounding, the formation of plaintiff's business relationship with defendants, the economic loss doctrine as explained by the Connecticut Supreme Court in Ulbrich v. Groth, 310 Conn. 375 (2013) is inapplicable to plaintiff's claims. Accordingly, defendants' motion to dismiss plaintiff's negligent misrepresentation, fraudulent misrepresentation and breach of fiduciary duty counts should be denied because they are not barred by the economic loss doctrine.

In Ulbrich, the Connecticut Supreme Court held that "the economic loss doctrine bars negligence claims that arise out of and are dependent on breach of contract claims that result in only economic loss." 310 Conn. at 410. However, the Ulrich court clarified that, "[s]pecifically, as this court recognized in Flagg Energy Development Corp. v. General Motors, [citation omitted], a plaintiff that has a contractual relationship with the defendant can bring a negligent misrepresentation claim against the defendant when the negligent misrepresentation induced the plaintiff to enter into a contract." Id. at 406. Thus, the Connecticut Supreme Court recognized the viability of additional causes of action seeking "independent remedies" under circumstances involving a contract dispute. Id. The Court reasoned that "[s]uch a claim would not 'arise out of' the breach of any contractual obligation because it would implicate contract formation." Id. (citing Budgetel Inns, Inc. v. Micros Systems, Inc., 8 F.Supp.2d 1137, 1147 (E.D.Wis.1998) (holding that fraud in the inducement occurs prior to contract formation and, in and of itself, does not constitute a breach of contract); Abi-Najm v. Concord Condominium, LLC, 280 Va. 350, 363, 699 S.E.2d 483 (2010) (holding that the economic loss doctrine did not bar a fraudulent inducement claim where defendant committed the fraud prior to the

contract's existence, and thus the duty breached by defendant could not have been found in the contract).

As explained more fully infra, plaintiff's tort claims against defendants Beta Pharma and Zhang implicate defendants' misrepresentations and omissions made to plaintiff prior to the parties' agreement upon which plaintiff relied in entering into a business relationship with defendants. Accordingly, plaintiff's claims in this regard are not barred by the economic loss doctrine.

1. Negligent Misrepresentation Counts

a. *Defendant Beta Pharma*

In the Third Count of his complaint, plaintiff alleges several specific facts that demonstrate defendant Beta Pharma made representations to plaintiff that were negligently false and misleading in order to induce plaintiff to enter into the business relationship with Beta Pharma as alleged.² Further, plaintiff alleges that Beta Pharma negligently withheld and/or omitted informing plaintiff about several

² In paragraph 14 of the Third Count of plaintiff's complaint, plaintiff specifically alleges:

"14. In reliance on BP's negligent misrepresentations, and because he did not know the material information defendant negligently withheld, plaintiff (a) formed Beta Pharma Canada, ("BPC") a Canadian corporation owned 51% by plaintiff and 49% by defendant Zhang; (b) invested approximately \$300,000 of his funds into setting up and operating the BPC laboratory; (c) worked for BPC full time for approximately 3 years, performing drug discovery research and developing new medicinal molecules for treatment of cancer and inflammatory disease; (d) applied for patents for the new molecules he discovered while working at BPS; (e) worked with BP to develop Icotinib and reinforce the Icotinib patent; (f) performed other work and did other business to advance BP, BPC and Zhang; (g) turned down other opportunities to work elsewhere; and (h) continued to hold his ZBP shares with the expectation that he would be able to realize their value, and their increasing value; (i) continued to work for BPC, for the benefit of Zhang and BP; and (j) deferred taking legal action against defendants."

facts that affected his decision to enter into a business agreement with Beta Pharma.

In paragraphs 11 and 12 of the Third Count, plaintiff alleges that Beta Pharma, acting by its chief executive Zhang, misrepresented to plaintiff that (a) defendant would pay plaintiff a stated salary, when defendant knew, or should have known it would not pay plaintiff; (b) plaintiff would receive Beta Pharma stock, which ownership would increase annually, when defendant knew, or should have known, it would not deliver that stock to plaintiff; and (c) that plaintiff owned 1% of the stock in ZBP, which was worth \$4 million in about 2011 and about \$6 million in 2013, and that plaintiff would participate in the ZBP public offering in China, when defendant knew, or should have known, that plaintiff would never be a registered owner of ZBP stock or participate in ZBP's intended public offering because defendant Beta Pharma would not or could not cause plaintiffs' share ownership to be registered on the official records of ZBP, and that unless Beta Pharma repurchased plaintiff's shares, there was no way for plaintiff to realize the cash value of his stockholding in ZBP because plaintiff's shares were not transferable or saleable to others.

In addition to these active negligent misrepresentations, defendant Beta Pharma also failed to disclose significant material information to plaintiff – the withholding of which information was intended to induce plaintiff to enter into a business agreement with Beta Pharma. In paragraph 13 of the Third Count, plaintiff alleges that Beta Pharma failed to disclose to plaintiff: (a) material information concerning the financial condition of Beta Pharma and Zhejiang Beta Pharma (ZBP); (b) material information concerning the transactions and relationship between Beta Pharma and ZBP; (c) material information concerning transactions in which Beta Pharma sold or transferred ZBP shares to others for valuable consideration; (d) Beta Pharma's knowledge that ZBP would not permit the ZBP shares transferred to plaintiff by Beta Pharma to be registered in China; (e) Beta Pharma's knowledge that

the ZBP board had ordered Beta Pharma to repurchase ZBP shares from investors at their current fair market value; (f) Beta Pharma's knowledge of the nature and extent of the market it made, or was prepared to make, for repurchase of ZBP shares so that investors could realize gain on their investments in ZBP; (g) that Beta Pharma had failed to provide to plaintiff material documentary information concerning Beta Pharma and ZBP, including disclosure of financial and corporate governance matters, and including information so that plaintiff could assess the risks of the transactions he was entering, and determine whether or not to acquire shares of Beta Pharma and ZBP, including prospectuses, balance sheets, income statements, statements of profit and loss, accountant's compilations, tax returns, disclosures of material items which did or could affect the financial condition of Beta Pharma or ZBP, and other documentation from which plaintiff could assess true condition and potential of Beta Pharma and ZBP; and (h) that Beta Pharma and its controlling officer Zhang had failed to comply with Connecticut securities laws regulating their ability to sell unregistered securities in Connecticut, including C.G. S. Sec. 36b-4 and 36b-16.

Plaintiff's factual allegations involve misrepresentations and omissions made by defendant Beta Pharma to plaintiff even before the parties entered into the agreement at issue, and which induced plaintiff to enter into the agreement in the first instance. In Whitney v. J.M. Scott Associates, Inc., No. LLICV09507099S, 2014 WL 1647095 (Conn.Super. March 26, 2014) (Danaher, J.), plaintiff brought claims for breach of contract, breach of the covenant of good faith and fair dealing, fraud and violation of CUTPA. Whitney involved the termination of a business relationship between the parties that initially arose from three separate agreements. In deciding plaintiff's claims, the court rejected defendants' argument that plaintiff's fraud claims were barred by the economic loss doctrine because the parties' entire business relationship was subsumed in the contractual agreements. In particular,

the court found that defendant's fraud began prior to the formation of the agreements:

The plaintiff is permitted to bring claims in both breach of contract and fraud because the fraudulent scheme found by the court began prior to the execution of the contracts at issue. Indeed, the defendants' fraudulent withholding of substantial and critical information from the plaintiff was intended to induce the plaintiff to enter into the three agreements at issue. Thus, the economic loss doctrine does not preclude the plaintiff from bring both breach of contract and fraud claims. Ulbrich v. Groth, 310 Conn. 375, 406, 78 A.3d 76 (2013).

Id. at * 21 n. 20.³

The factual situation in Whitney is similar to that here. Drawing all reasonable inferences in plaintiff's favor, the factual allegations in the Third Count of plaintiff's complaint demonstrate that defendant's negligent misrepresentations and omissions induced plaintiff to enter into a business agreement with defendant Beta Pharma, and that Beta Pharma is liable for that misconduct. Under these circumstances, plaintiff's negligent misrepresentation claim against Beta Pharma in the Third Count is not barred by the economic loss doctrine as clarified by the Connecticut Supreme Court in Ulrich v. Groth, and defendant's motion to dismiss that claim should be denied.

³ Indeed, the type of material information withheld by the defendants in Whitney is similar to that alleged by plaintiff here. In Whitney, the court found that:

Before entering into the various agreements, the plaintiff reviewed and relied upon the accuracy of SSP's financial statements, tax returns and corporate records. Scott and SSP concealed information that should have been in the financial statements or in notes to those financial statements, including deferred compensation liabilities owed to Scott that, by March 2007, exceeded \$2.5 million.

Id. at *1.

b. Defendant Zhang

A similar analysis applies to plaintiff's negligent misrepresentation claim against defendant Zhang in the Sixth Count of his complaint. In the Sixth Count, plaintiff alleges several specific facts that demonstrate defendant Zhang made representations to plaintiff that were negligently false and misleading in order to induce plaintiff to enter into the business relationship with Zhang as alleged in paragraph 15 of the Sixth Count.⁴ Further, plaintiff alleges that Zhang negligently withheld and/or omitted informing plaintiff about several facts that affected his decision to enter into a business agreement with Zhang.

In paragraphs 12 and 13 of the Sixth Count, plaintiff alleges that Zhang misrepresented to plaintiff that (a) plaintiff would be paid a stated salary, when defendant knew, or should have known that such salary would not be paid to plaintiff because neither Zhang nor Beta Pharma had sufficient capital and cash flow, or expected sufficient capital and cash flow to pay plaintiff the promised salary; (b) plaintiff would receive Beta Pharma stock, which ownership would increase annually, when defendant knew, or should have known, it would not deliver that stock to plaintiff; and (c) that plaintiff owned 1% of the stock in ZBP, which was worth \$4 million in about 2011 and about \$6 million in 2013, and that plaintiff would participate in the ZBP public offering in China, when defendant knew, or should have known, that plaintiff would never be a registered owner of ZBP stock or participate in ZBP's intended public offering because defendant Zhang (1) would not or could not cause plaintiffs' share ownership to be registered on the official records of ZBP; (2) could not register plaintiff's shares on the ZBP official shareholder list in China without the consent of the other stockholders, officers and

⁴ Specifically, defendant Zhang sought to go into business with plaintiff to establish a drug discovery company in Canada, which company was to be supported by plaintiff's capital and expertise. (Sixth Count at ¶11).

directors of ZBP; (3) had made no effort to obtain this consent prior to representing to plaintiff that plaintiff could participate in the ZBP public offering and, even if such consent had been sought, it was unlikely to have been obtained; (4) had no assurance from anyone in authority at ZBP that he could deliver on the promised participation in the ZBP public offering; and that unless Beta Pharma repurchased plaintiff's shares, there was no way for plaintiff to realize the cash value of his stockholding in ZBP because plaintiff's shares were not transferable or saleable to others.

In addition to these active negligent misrepresentations, defendant Zhang also failed to disclose significant material information to plaintiff – the withholding of which information was intended to induce plaintiff to enter into a business agreement with him. In paragraph 14 of the Sixth Count, plaintiff alleges that Zhang failed to disclose to plaintiff: (a) material information concerning the financial condition of Beta Pharma and Zhejiang Beta Pharma (ZBP); (b) material information concerning the transactions and relationship between Beta Pharma and ZBP; (c) material information concerning transactions in which Beta Pharma sold or transferred ZBP shares to others for valuable consideration; (d) his knowledge that ZBP would not permit the ZBP shares transferred to plaintiff by Beta Pharma to be registered in China; (e) his knowledge that the ZBP board had ordered Beta Pharma to repurchase ZBP shares from investors at their current fair market value; (f) his knowledge of the nature and extent of the market Beta Pharma made, or was prepared to make, for repurchase of ZBP shares so that investors could realize gain on their investments in ZBP; (g) that he and Beta Pharma had failed to provide to plaintiff material documentary information concerning Beta Pharma and ZBP, including disclosure of financial and corporate governance matters, and including information so that plaintiff could assess the risks of the transactions he was entering, and determine whether or not to acquire shares of Beta Pharma and ZBP,

including prospectuses, balance sheets, income statements, statements of profit and loss, accountant's compilations, tax returns, disclosures of material items which did or could affect the financial condition of Beta Pharma or ZBP, and other documentation from which plaintiff could assess the true condition and potential of Beta Pharma and ZBP; and (h) that Beta Pharma and Zhang, its controlling officer, had failed to comply with Connecticut securities laws regulating their ability to sell unregistered securities in Connecticut, including C.G. S. Sec. 36b-4 and 36b-16.

Plaintiff's factual allegations involve misrepresentations and omissions made by defendant Zhang to plaintiff even before the parties entered into the agreement at issue, and which induced plaintiff to enter into the agreement in the first instance. As discussed supra, this case is similar to Whitney v. J.M. Scott Associates, Inc., No. LLICV09507099S, 2014 WL 1647095 (Conn.Super. March 26, 2014) (Danaher, J.), wherein the court concluded that plaintiff's tort claim was not precluded by the economic loss doctrine where defendants' omission of substantial and critical information from the plaintiff was intended to induce the plaintiff to enter into the business agreements at issue, citing Ulbrich v. Groth, 310 Conn. 375, 406 (2013).

Thus, drawing all reasonable inferences in plaintiff's favor, the factual allegations in the Sixth Count of plaintiff's complaint demonstrate that defendant Zhang's negligent misrepresentations and omissions induced plaintiff to enter into a business agreement with him, and that defendant is liable for that misconduct. Under these circumstances, plaintiff's negligent misrepresentation claim against Zhang in the Sixth Count is not barred by the economic loss doctrine as clarified by the Connecticut Supreme Court in Ulrich v. Groth, and defendant's motion to dismiss that claim should be denied.

2. Fraudulent Misrepresentation Counts

a. Defendant Beta Pharma

In the Fourth Count of his complaint, plaintiff alleges several specific facts that demonstrate defendant Beta Pharma made representations to plaintiff that were deliberately false, fraudulent and misleading in order to induce plaintiff to enter into the business relationship with Beta Pharma as alleged in paragraph 14 of the Fourth Count. Further, plaintiff alleges that Beta Pharma deliberately failed to disclose to plaintiff several facts that affected his decision to enter into a business agreement with Beta Pharma.

In paragraphs 11 and 12 of the Fourth Count, plaintiff alleges that Beta Pharma, acting by its chief executive Zhang, misrepresented to plaintiff that (a) defendant would pay plaintiff a stated salary, when defendant knew, or should have known it would not pay plaintiff; (b) plaintiff would receive Beta Pharma stock, which ownership would increase annually, when defendant knew, or should have known, it would not deliver that stock to plaintiff; and (c) that plaintiff owned 1% of the stock in ZBP, which was worth \$4 million in about 2011 and about \$6 million in 2013, and that plaintiff would participate in the ZBP public offering in China, when defendant knew, or should have known, that plaintiff would never be a registered owner of ZBP stock or participate in ZBP's intended public offering because defendant Beta Pharma would not or could not cause plaintiffs' share ownership to be registered on the official records of ZBP, and that unless Beta Pharma repurchased plaintiff's shares, there was no way for plaintiff to realize the cash value of his stockholding in ZBP because plaintiff's shares were not transferable or saleable to others.

In addition to these active deliberately false and fraudulent misrepresentations, defendant Beta Pharma also failed to disclose significant material information to plaintiff – the withholding of which was intended to induce

plaintiff to enter into a business agreement with Beta Pharma. In paragraph 13 of the Fourth Count, plaintiff alleges that Beta Pharma failed to disclose to plaintiff: (a) material information concerning the financial condition of Beta Pharma and Zhejiang Beta Pharma (ZBP); (b) material information concerning the transactions and relationship between Beta Pharma and ZBP; (c) material information concerning transactions in which Beta Pharma sold or transferred ZBP shares to others for valuable consideration; (d) Beta Pharma's knowledge that ZBP would not permit the ZBP shares transferred to plaintiff by Beta Pharma to be registered in China; (e) Beta Pharma's knowledge that the ZBP board had ordered Beta Pharma to repurchase ZBP shares from investors at their current fair market value; (f) Beta Pharma's knowledge of the nature and extent of the market it made, or was prepared to make, for repurchase of ZBP shares so that investors could realize gain on their investments in ZBP; (g) that Beta Pharma had failed to provide to plaintiff material documentary information concerning Beta Pharma and ZBP, including disclosure of financial and corporate governance matters, and including information so that plaintiff could assess the risks of the transactions he was entering, and determine whether or not to acquire shares of Beta Pharma and ZBP, including prospectuses, balance sheets, income statements, statements of profit and loss, accountant's compilations, tax returns, disclosures of material items which did or could affect the financial condition of Beta Pharma or ZBP, and other documentation from which plaintiff could assess true condition and potential of Beta Pharma and ZBP; and (h) that Beta Pharma and its controlling officer Zhang had failed to comply with Connecticut securities laws regulating their ability to sell unregistered securities in Connecticut, including C.G. S. Sec. 36b-4 and 36b-16.

Plaintiff's factual allegations involve intentional and fraudulent misrepresentations and omissions made by defendant Beta Pharma to plaintiff even before the parties entered into the agreement at issue, and which induced plaintiff to

enter into the agreement in the first instance. As discussed supra, this case is similar to Whitney v. J.M. Scott Associates, Inc., No. LLICV09507099S, 2014 WL 1647095 (Conn.Super. March 26, 2014) (Danaher, J.), wherein the court concluded that plaintiff's fraud claim was not precluded by the economic loss doctrine where defendants' omission of substantial and critical information from the plaintiff was intended to induce the plaintiff to enter into the business agreements at issue, citing Ulbrich v. Groth, 310 Conn. 375, 406 (2013).

Additionally, the economic loss doctrine does not bar plaintiff's fraudulent misrepresentation claim because plaintiff seeks punitive damages on that claim against defendant Beta Pharma. Under Connecticut law, "[i]t is well settled that punitive damages generally are not recoverable for breach of contract." Lydall, Inc. v. Ruschmeyer, 282 Conn. 209, 244 n. 24 (2007) (citing Triangle Sheet Metal Works, Inc. v. Silver, 154 Conn. 116, 127 (1966)). "This is so because . . . punitive or exemplary damages are assessed by way of punishment, and the motivating basis does not usually arise as a result of the ordinary private contract relationship." Barry v. Posi-Seal Int'l, Inc., 40 Conn. App. 577, 584 (1996) (citing L.F. Pace & Sons, Inc. v. Travelers Indemnity Co., 9 Conn.App. 30, 47-48 (1986)).

Accordingly, because plaintiff is seeking a remedy independent from his breach of contract claim, which does not arise from, nor is not dependent on, the breach of contract claim, plaintiff's fraudulent misrepresentation count against Beta Pharma is not barred by the economic loss doctrine See Wiygul v. Thomas, No. FSTCV136016967S, 2014 WL 3397720 (Conn.Super. June 3, 2014) (granting motion to strike economic loss doctrine defense where plaintiff sought punitive damages which was a remedy "independent from the claim for breach of contract").

Thus, drawing all reasonable inferences in plaintiff's favor, the factual allegations in the Fourth Count of plaintiff's complaint demonstrate that defendant Beta Pharma's deliberate and fraudulent misrepresentations and omissions induced

plaintiff to enter into a business agreement with Beta Pharma, and that Beta Pharma is liable for that misconduct. Under these circumstances, plaintiff's fraudulent misrepresentation claim against Beta Pharma in the Fourth Count is not barred by the economic loss doctrine as clarified by the Connecticut Supreme Court in Ulrich v. Groth, and defendant's motion to dismiss that claim should be denied.

b. Defendant Zhang

A similar analysis applies to plaintiff's fraudulent misrepresentation claim against defendant Zhang in the Seventh Count of his complaint. In the Seventh Count, plaintiff alleges several specific facts that demonstrate defendant Zhang made representations to plaintiff that were deliberately false, fraudulent and misleading in order to induce plaintiff to enter into the business relationship with Zhang as alleged in paragraph 15 of the Seventh Count. Further, plaintiff alleges that Zhang deliberately withheld and/or omitted informing plaintiff about several facts that affected his decision to enter into a business agreement with Zhang.

In paragraphs 12 and 13 of the Seventh Count, plaintiff alleges that Zhang misrepresented to plaintiff that (a) plaintiff would be paid a stated salary, when defendant knew, or should have known that such salary would not be paid to plaintiff because neither Zhang nor Beta Pharma had sufficient capital and cash flow, or expected sufficient capital and cash flow to pay plaintiff the promised salary; (b) plaintiff would receive Beta Pharma stock, which ownership would increase annually, when defendant knew, or should have known, it would not deliver that stock to plaintiff; and (c) that plaintiff owned 1% of the stock in ZBP, which was worth \$4 million in about 2011 and about \$6 million in 2013, and that plaintiff would participate in the ZBP public offering in China, when defendant knew, or should have known, that plaintiff would never be a registered owner of ZBP stock or participate in ZBP's intended public offering because defendant Zhang (1) would not or could not cause plaintiffs' share ownership to be registered on the official

records of ZBP; (2) could not register plaintiff's shares on the ZBP official shareholder list in China without the consent of the other stockholders, officers and directors of ZBP; (3) had made no effort to obtain this consent prior to representing to plaintiff that plaintiff could participate in the ZBP public offering and, even if such consent had been sought, it was unlikely to have been obtained; (4) had no assurance from anyone in authority at ZBP that he could deliver on the promised participation in the ZBP public offering; and that unless Beta Pharma repurchased plaintiff's shares, there was no way for plaintiff to realize the cash value of his stockholding in ZBP because plaintiff's shares were not transferable or saleable to others.

In addition to these active deliberate and fraudulent misrepresentations, defendant Zhang also failed to disclose significant material information to plaintiff – the withholding of which information was intended to induce plaintiff to enter into a business agreement with him. In paragraph 14 of the Seventh Count, plaintiff alleges that Zhang failed to disclose to plaintiff: (a) material information concerning the financial condition of Beta Pharma and Zhejiang Beta Pharma (ZBP); (b) material information concerning the transactions and relationship between Beta Pharma and ZBP; (c) material information concerning transactions in which Beta Pharma sold or transferred ZBP shares to others for valuable consideration; (d) his knowledge that ZBP would not permit the ZBP shares transferred to plaintiff by Beta Pharma to be registered in China; (e) his knowledge that the ZBP board had ordered Beta Pharma to repurchase ZBP shares from investors at their current fair market value; (f) his knowledge of the nature and extent of the market Beta Pharma made, or was prepared to make, for repurchase of ZBP shares so that investors could realize gain on their investments in ZBP; (g) that he and Beta Pharma had failed to provide to plaintiff material documentary information concerning Beta Pharma and ZBP, including disclosure of financial and corporate governance matters, and including

information so that plaintiff could assess the risks of the transactions he was entering, and determine whether or not to acquire shares of Beta Pharma and ZBP, including prospectuses, balance sheets, income statements, statements of profit and loss, accountant's compilations, tax returns, disclosures of material items which did or could affect the financial condition of Beta Pharma or ZBP, and other documentation from which plaintiff could assess true condition and potential of Beta Pharma and ZBP; and (h) that Beta Pharma and Zhang, its controlling officer, had failed to comply with Connecticut securities laws regulating their ability to sell unregistered securities in Connecticut, including C.G. S. Sec. 36b-4 and 36b-16.

Plaintiff's factual allegations involve fraudulent and deliberate misrepresentations and omissions made by defendant Zhang to plaintiff even before the parties entered into the agreement at issue, and which induced plaintiff to enter into the agreement in the first instance. As discussed supra, this case is similar to Whitney v. J.M. Scott Associates, Inc., No. LLICV09507099S, 2014 WL 1647095 (Conn.Super. March 26, 2014) (Danaher, J.), wherein the court concluded that plaintiff's fraud claim was not precluded by the economic loss doctrine where defendants' omission of substantial and critical information from the plaintiff was intended to induce the plaintiff to enter into the business agreements at issue, citing Ulbrich v. Groth, 310 Conn. 375, 406 (2013).

Additionally, the economic loss doctrine does not bar plaintiff's fraudulent misrepresentation claim because plaintiff seeks punitive damages on that claim against defendant Zhang. Under Connecticut law, "[i]t is well settled that punitive damages generally are not recoverable for breach of contract." Lydall, Inc. v. Ruschmeyer, 282 Conn. 209, 244 n. 24 (2007) (citing Triangle Sheet Metal Works, Inc. v. Silver, 154 Conn. 116, 127 (1966)). "This is so because . . . punitive or exemplary damages are assessed by way of punishment, and the motivating basis does not usually arise as a result of the ordinary private contract relationship." Barry v. Posi-

Seal Int'l, Inc., 40 Conn. App. 577, 584 (1996) (citing L.F. Pace & Sons, Inc. v. Travelers Indemnity Co., 9 Conn.App. 30, 47-48 (1986)).

Accordingly, because plaintiff is seeking a remedy independent from his breach of contract claim, which does not arise from, nor is not dependent on, the breach of contract claim, plaintiff's fraudulent misrepresentation count against Zhang is not barred by the economic loss doctrine See Wiygul v. Thomas, No. FSTCV136016967S, 2014 WL 3397720 (Conn.Super. June 3, 2014) (granting motion to strike economic loss doctrine defense where plaintiff sought punitive damages which was a remedy "independent from the claim for breach of contract").

Thus, drawing all reasonable inferences in plaintiff's favor, the factual allegations in the Seventh Count of plaintiff's complaint demonstrate that defendant Zhang's fraudulent misrepresentations and omissions induced plaintiff to enter into a business agreement with him, and that defendant is liable for that misconduct. Under these circumstances, plaintiff's fraudulent misrepresentation claim against Zhang in the Seventh Count is not barred by the economic loss doctrine as clarified by the Connecticut Supreme Court in Ulrich v. Groth, and defendant's motion to dismiss that claim should be denied.

3. Breach of Fiduciary Duty Counts

a. *Defendant Beta Pharma*

In the Fifth Count of his complaint, plaintiff alleges several specific facts that demonstrate defendant Beta Pharma breached its fiduciary duty to plaintiff by making representations to plaintiff that were deliberately false, fraudulent and misleading, or that defendant should have known were false and misleading, in order to induce plaintiff to enter into a business relationship with Beta Pharma as alleged in paragraph 14 of the Fifth Count. Further, plaintiff alleges that Beta Pharma deliberately failed to disclose to plaintiff several facts that affected his

decision to enter into a business agreement with Beta Pharma, which owed plaintiff fiduciary duties of loyalty, honesty and good faith.

In paragraph 13 of the Fifth Count, plaintiff alleges that Beta Pharma, breached its fiduciary duties to plaintiff, inter alia: (a) by misrepresenting to plaintiff that it would finance plaintiff's work and investment in Beta Pharma Canada, but failing to do so; (b) by promising plaintiff that plaintiff's salary arrearage would be paid from the proceeds of Beta Pharma's venture capital fundraising activities, but failing to pay him; (c) by failing to disclose to plaintiff that the ZBP board of directors would not permit Beta Pharma to transfer shares to plaintiff, and would not recognize Beta Pharma's transfer of shares, and that it had ordered Beta Pharma to cancel or unwind the transaction by paying plaintiff the fair market value of his interest in ZBP; (d) by failing to provide plaintiff with material financial information so that plaintiff could determine whether or not to acquire shares of Beta Pharma and ZBP, including prospectuses, balance sheets, income statements, statements of profit and loss, accountant's compilations, tax returns, disclosures of material items which did or could affect the financial condition of Beta Pharma or ZBP, and other documentation from which plaintiff could assess true condition and potential of Beta Pharma and ZBP; (e) by misrepresenting to plaintiff the value and marketability of plaintiff's ZBP shares; (f) by failing to provide plaintiff with full disclosure of all material information to which plaintiff was entitled pursuant to the securities laws of the State of Connecticut, including C.G. S. Sec. 36b-4 and 36b-16, thereby violating those laws.

Plaintiff's factual allegations involve breach of fiduciary duties owed to plaintiff by defendant Beta Pharma even before the parties entered into the agreement at issue,⁵ and which induced plaintiff to enter into the agreement in the

⁵ See discussion, infra, at section III.C.1.

first instance. As discussed supra, this case is similar to Whitney v. J.M. Scott Associates, Inc., No. LLICV09507099S, 2014 WL 1647095 (Conn.Super. March 26, 2014) (Danaher, J.), wherein the court concluded that plaintiff's fraud claim was not precluded by the economic loss doctrine where defendants' omission of substantial and critical information from the plaintiff was intended to induce the plaintiff to enter into the business agreements at issue, citing Ulbrich v. Groth, 310 Conn. 375, 406 (2013).

Additionally, the economic loss doctrine does not bar plaintiff's breach of fiduciary duty claim because plaintiff seeks punitive damages on that claim against defendant Beta Pharma. Under Connecticut law, "[i]t is well settled that punitive damages generally are not recoverable for breach of contract." Lydall, Inc. v. Ruschmeyer, 282 Conn. 209, 244 n. 24 (2007) (citing Triangle Sheet Metal Works, Inc. v. Silver, 154 Conn. 116, 127 (1966)). "This is so because . . . punitive or exemplary damages are assessed by way of punishment, and the motivating basis does not usually arise as a result of the ordinary private contract relationship." Barry v. Posi-Seal Int'l, Inc., 40 Conn. App. 577, 584 (1996) (citing L.F. Pace & Sons, Inc. v. Travelers Indemnity Co., 9 Conn.App. 30, 47-48 (1986)).

Accordingly, because plaintiff is seeking a remedy independent from his breach of contract claim, which does not arise from, nor is not dependent on, the breach of contract claim, plaintiff's breach of fiduciary duty count against Beta Pharma is not barred by the economic loss doctrine See Wiygul v. Thomas, No. FSTCV136016967S, 2014 WL 3397720 (Conn.Super. June 3, 2014) (granting motion to strike economic loss doctrine defense where plaintiff sought punitive damages which was a remedy "independent from the claim for breach of contract").

Thus, drawing all reasonable inferences in plaintiff's favor, the factual allegations in the Fifth Count of plaintiff's complaint demonstrate that defendant Beta Pharma's breach of fiduciary duty induced plaintiff to enter into a business

agreement with Beta Pharma, and that defendant is liable for that misconduct. Under these circumstances, plaintiff's breach of fiduciary duty claim against Beta Pharma in the Fifth Count is not barred by the economic loss doctrine as clarified by the Connecticut Supreme Court in Ulrich v. Groth, and defendant's motion to dismiss that claim should be denied.

b. Defendant Zhang

In the Eighth Count of his complaint, plaintiff alleges several specific facts that demonstrate defendant Zhang breached his fiduciary duty to plaintiff by making representations to plaintiff that were deliberately false, fraudulent and misleading, or that defendant should have known were false and misleading, in order to induce plaintiff to enter into the business relationship with Zhang as alleged in paragraph 16 of the Eighth Count. Further, plaintiff alleges that Zhang deliberately failed to disclose to plaintiff several facts that affected his decision to enter into a business agreement with Zhang, who owed plaintiff fiduciary duties of loyalty, honesty and good faith.

In paragraph 15 of the Eighth Count, plaintiff alleges that Zhang breached his fiduciary duties to plaintiff, inter alia: (a) by misrepresenting to plaintiff that plaintiff's work and investment in Beta Pharma Canada would be financed; (b) by promising plaintiff that plaintiff's salary arrearage would be paid from the proceeds of Beta Pharma's venture capital fundraising activities; (c) by failing to disclose to plaintiff that the ZBP board of directors would not permit Beta Pharma to transfer shares to plaintiff, and would not recognize BP's transfer of shares, and that it had ordered Beta Pharma to cancel or unwind the transaction by paying plaintiff the fair market value of his interest in ZBP; (d) by failing to provide plaintiff with material financial information so that plaintiff could determine whether or not to acquire shares of Beta Pharma and ZBP, including prospectuses, balance sheets, income statements, statements of profit and loss, accountant's compilations, tax returns,

disclosures of material items which did or could affect the financial condition of Beta Pharma or ZBP, and other documentation from which plaintiff could assess true condition and potential of Beta Pharma and ZBP; (e) by misrepresenting to plaintiff the value and marketability of plaintiff's ZBP shares; (f) by failing to provide plaintiff with full disclosure of all material information to which plaintiff was entitled concerning Beta Pharma and ZBP, including the risks of his investment, pursuant to the securities laws of the State of Connecticut, including C.G. S. Sec. 36b-4 and 36b-16, thereby violating those laws.

Plaintiff's factual allegations involve breach of fiduciary duties owed to plaintiff by defendant Zhang even before the parties entered into the agreement at issue,⁶ and which induced plaintiff to enter into the agreement in the first instance. As discussed supra, this case is similar to Whitney v. J.M. Scott Associates, Inc., No. LLICV09507099S, 2014 WL 1647095 (Conn.Super. March 26, 2014) (Danaher, J.), wherein the court concluded that plaintiff's fraud claim was not precluded by the economic loss doctrine where defendants' omission of substantial and critical information from the plaintiff was intended to induce the plaintiff to enter into the business agreements at issue, citing Ulbrich v. Groth, 310 Conn. 375, 406 (2013).

Additionally, the economic loss doctrine does not bar plaintiff's breach of fiduciary duty claim because plaintiff seeks punitive damages on that claim against defendant Zhang. Under Connecticut law, "[i]t is well settled that punitive damages generally are not recoverable for breach of contract." Lydall, Inc. v. Ruschmeyer, 282 Conn. 209, 244 n. 24 (2007) (citing Triangle Sheet Metal Works, Inc. v. Silver, 154 Conn. 116, 127 (1966)). "This is so because . . . punitive or exemplary damages are assessed by way of punishment, and the motivating basis does not usually arise as a result of the ordinary private contract relationship." Barry v. Posi-Seal Int'l, Inc., 40

⁶ See discussion, infra, at section III.C.2.

Conn. App. 577, 584 (1996) (citing L.F. Pace & Sons, Inc. v. Travelers Indemnity Co., 9 Conn.App. 30, 47-48 (1986)).

Accordingly, because plaintiff is seeking a remedy independent from his breach of contract claim, which does not arise from, nor is not dependent on, the breach of contract claim, plaintiff's breach of fiduciary duty count against Zhang is not barred by the economic loss doctrine See Wiygul v. Thomas, No. FSTCV136016967S, 2014 WL 3397720 (Conn.Super. June 3, 2014) (granting motion to strike economic loss doctrine defense where plaintiff sought punitive damages which was a remedy "independent from the claim for breach of contract").

Thus, drawing all reasonable inferences in plaintiff's favor, the factual allegations in the Eighth Count of plaintiff's complaint demonstrate that defendant Zhang's breach of fiduciary duty induced plaintiff to enter into a business agreement with Zhang, and that he is liable for that misconduct. Under these circumstances, plaintiff's breach of fiduciary duty claim against Zhang in the Eighth Count is not barred by the economic loss doctrine as clarified by the Connecticut Supreme Court in Ulrich v. Groth, and defendant's motion to dismiss that claim should be denied.

B. Plaintiff has alleged his fraudulent misrepresentation claims against defendants Beta Pharma and Zhang with the particularity required by Fed.R.Civ.P. 9(b).

Defendants Beta Pharma and Zhang move to dismiss the counts of the complaint against them sounding in fraudulent misrepresentation, arguing that plaintiff has not alleged his fraud claim with sufficient particularity to satisfy the requirements of Fed.R.Civ.P. 9(b). Defendants' motion should be denied because, as demonstrated infra, plaintiff's fraudulent misrepresentation allegations comport with Rule 9(b) and provide clear notice to defendants of the claims made against them.

Under Connecticut law, the essential elements of a fraudulent misrepresentation claim are “(1) a false representation was made as a statement of fact; (2) it was untrue and known to be untrue by the party making it; (3) it was made to induce the other party to act upon it; and (4) the other party did so act upon that false representation to his injury....” Sturm v. Harb Dev., LLC, 298 Conn. 124, 142 (2010) (internal quotation marks and citation omitted).

Fed.R.Civ.P. 9(b) provides that a party alleging fraud “must state with particularity the circumstances constituting fraud. . . .” “To satisfy this requirement, a complaint must ‘specify the time, place, speaker, and content of the alleged misrepresentations,’ ‘explain how the misrepresentations were fraudulent and plead those events which give rise to a strong inference that the defendant[] had an intent to defraud, knowledge of the falsity, or a reckless disregard for the truth.’” Cohen v. S.A.C. Trading Corp., 711 F.3d 353, 359 (2d Cir. 2013) (quoting Caputo v. Pfizer, Inc., 267 F.3d 181, 191 (2d Cir.2001)). “‘However, ‘dates, times and places need not be pleaded with absolute precision; so long as the allegations sufficiently put the defendant on notice as to the circumstances of the charged misrepresentations.’” McCrae Associates, LLC v. Universal Capital Management, Inc., 554 F.Supp.2d 249, 253 (D.Conn. 2008) (quoting Harris v. Wells, 757 F.Supp. 171, 174 (D.Conn. 1991)).

A plaintiff may plead a strong inference of fraud “‘either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness.’” Eternity Global Master Fund Ltd. v. Morgan Guaranty Trust Co. of New York, 375 F.3d 168, 187 (2d Cir. 2004) (quoting Acito v. IMCERA Group, Inc., 47 F.3d 47, 52 (2d Cir. 1995) (internal quotation marks and citation omitted).

In the Fourth and Seventh Counts of his complaint, plaintiff alleges several specific facts that demonstrate defendants made representations to plaintiff that

were deliberately false, fraudulent and misleading in order to induce plaintiff to enter into a business relationship with them as alleged in paragraph 14 of the Fourth Count and paragraph 15 of the Seventh Count. Further, plaintiff alleges that defendants deliberately failed to disclose to plaintiff several facts that affected his decision to enter into a business agreement with Beta Pharma and Zhang.

In paragraphs 11 and 12 of the Fourth Count, and paragraphs 12 and 13 of the Seventh Count, plaintiff details the substance and content of the fraudulent misrepresentations it alleges, as well as the basis of why these representations, promises or statements were false. In particular, these paragraphs contend: (a) that defendants would pay plaintiff a stated salary, when defendants knew, or should have known, they would not or could not pay plaintiff; (b) plaintiff would receive Beta Pharma stock, which ownership would increase annually, when defendants knew, or should have known, they would not deliver that stock to plaintiff; and (c) that plaintiff owned 1% of the stock in ZBP, which was worth \$4 million in about 2011 and about \$6 million in 2013, and that plaintiff would participate in the ZBP public offering in China, when defendants knew, or should have known, that plaintiff would never be a registered owner of ZBP stock or participate in ZBP's intended public offering because defendants would not, or could not, cause plaintiff's share ownership to be registered on the official records of ZBP, and that unless Beta Pharma repurchased plaintiff's shares, there was no way for plaintiff to realize the cash value of his stockholding in ZBP because plaintiff's shares were not transferable or saleable to others.

Accordingly, these paragraphs specify the content of the alleged misrepresentations, as well as explain how those misrepresentations were fraudulent.⁷ Moreover, plaintiff specifically alleges that these representations were

⁷ In addition to these actively deliberately false and fraudulent misrepresentations, defendants also failed to disclose significant material information to plaintiff – the

made by Don Zhang, Beta Pharma's chief executive, and that some of these misrepresentations were made in writing on or around March 26, 2010 (paragraph 11). Further, construing all reasonable inferences in the plaintiff's favor, plaintiff's allegations in paragraphs 10, 11 and 12 of the Fourth Count and paragraphs 10, 11, 12 and 13 of the Seventh Count indicate that even the non-written misrepresentations were made around the time of the March 26, 2010 writing, or in any event prior to and/or shortly after the parties entered into their agreement. See Sovereign Bank v. ACB II, LLC, No.08cv1600, 2010 WL 363336 (D.Conn. Jan. 25, 2010) (denying motion to dismiss fraudulent misrepresentation claims under Fed.R.Civ.P. 9(b) where plaintiff identified the speaker and provided information regarding the subject of the claimed fraudulent statements, although not "exact quotations of the alleged statements"); McCrae Associates, LLC v. Universal Capital Management, Inc., 554 F.Supp.2d 249, 253 (D.Conn. 2008) (holding that "dates, times and places need not be pleaded with absolute precision, so long as the allegations sufficiently put the defendant on notice as to the circumstances of the charged misrepresentations") (internal quotation marks and citation omitted). See also Javier v. Deringer-Ney, Inc., 578 F.Supp.2d 368, 374 (D.Conn. 2008) (denying motion to dismiss plaintiff's fraudulent misrepresentation claim under Rule 9(b) where plaintiff alleged the identity of the speaker of the fraudulent statement, the substance of the statement which indicated false assurances as to job security, and the general time frame when the misrepresentation was made).

In Walters v. Generation Financial Mortgage, LLC, No.3:10cv647, 2012 WL 1150880 (D.Conn. April 5, 2012), the court denied defendant's motion to dismiss plaintiff's fraud claim under Fed.R.Civ.P. 9(b), holding that plaintiff's allegations

withholding of which was intended to fraudulently induce plaintiff to enter into a business agreement with Beta Pharma. See paragraph 13 of the Fourth Count and paragraph 14 of the Seventh Count.

were sufficiently particular to satisfy the requirements of the rule. The court reasoned:

Defendants made representations that plaintiff's employment would only be terminated for cause and that plaintiff's ownership interest could be worth \$3,500,000 to \$11,000,000. Defendants' statements to plaintiff about his employment contract and the value of his ownership interest in the company were made with the intent of inducing reliance thereon—so plaintiff would sell Amston to defendant Generation. Plaintiff relied on these statements. Drawing all inferences in favor of plaintiff, defendants' failure to comply with the employment agreement and \$350 payment for plaintiff's ownership interest make feasible plaintiff's claim that defendants' false statements were known to be untrue by defendants. Therefore, defendants' motion to dismiss will be denied.

Id. at *4. Indeed, the allegations found sufficiently particular in Walters are similar to those made by plaintiff here.

Additionally, plaintiff has pleaded events that give a strong inference that defendants intended to defraud plaintiff, and/or that defendants demonstrated a reckless disregard for the truth. Specifically, defendants represented to plaintiff that Beta Pharma was better positioned financially than it actually was; that defendants were authorized to provide plaintiff with ZBP stock when defendants knew that they were not; that plaintiff would participate in the ZBP initial public offering when defendants knew that would be impossible because his stock could not be registered; and that he would receive a certain salary when defendants knew that Beta Pharma would not, or could not, perform.

As plaintiff alleges in his complaint, defendants sought to enter into a business relationship with plaintiff – including to establish a drug discovery company in Canada – in order to utilize plaintiff's capital and expertise. Plaintiff's allegations provide a clear inference that defendants deliberately made false statements and promises in order to induce plaintiff to participate. See Sovereign Bank v. ACB II, LLC, No.08cv1600, 2010 WL 36336 (D.Conn. Jan. 25, 2010)

(sufficiently alleging circumstances indicating fraudulent intent by alleging that defendant knew about the risks and deficiencies of the parties business arrangement, and had participated in creating them, but failed to inform plaintiff); McCrae Associates, LLC v. Universal Capital Management, Inc., 554 F.Supp.2d 249, 253 (D.Conn. 2008) (denying motion to dismiss fraud counts for failure to allege fraud with particularity where, inter alia, sufficient allegations were made to demonstrate fraudulent intent where allegations charged self-dealing, as well as the making of certain business promises that were not kept).

For the foregoing reasons, defendants' motion should be denied because plaintiff's fraudulent misrepresentation allegations comport with Rule 9(b) and provide clear notice to defendants of the claims made against them.

C. Plaintiff has alleged sufficient facts to demonstrate that defendants owed a fiduciary duty to plaintiff.

Defendants move to dismiss the Fifth and Eighth Counts of plaintiff's complaint, arguing that plaintiff has not stated a claim for breach of fiduciary duty. Defendants claim that plaintiff has not sufficiently pleaded that defendants owed plaintiff a fiduciary duty. For the following reasons, however, defendants' motion should be denied because plaintiff has pled facts demonstrating the existence of a fiduciary duty between defendants and the plaintiff.

“‘[A] fiduciary or confidential relationship is characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other.’” Di Teresi v. Stamford Health Sys., Inc., 142 Conn. App. 72, 94 (2013) (quoting Sherwood v. Danbury Hospital, 278 Conn. 163, 195 (2006)). Additionally, “[t]he superior position of the fiduciary or dominant party affords him great opportunity for abuse of the confidence reposed in him.” Iacurci v. Sax, 139 Conn. App. 386, 401 (2012)

(citing Falls Church Group, Ltd. v. Tyler, Cooper & Alcorn, LLP, , 281 Conn. 84, 108-09 (2007)).

As the Connecticut Appellate Court stated in Di Teresi, “[t]he universe of fiduciary relationships is not static. ‘Rather than attempt to define a fiduciary relationship in precise detail and in such a manner to exclude new situations, we have instead chosen to leave the bars down for situations in which there is a justifiable trust confided on one side and a resulting superiority and influence on the other.’” Id. (quoting Dunham v. Dunham, 204 Conn. 303, 320 (1987)).

“Fiduciaries appear in a variety of forms, including agents, partners, lawyers, directors, trustees, executors, receivers, bailees and guardians. [E]quity has carefully refrained from defining a fiduciary relationship in precise detail and in such a manner as to exclude new situations.” Falls Church Group, 281 Conn. at 108-09 (quoting Konover Development Corp. v. Zeller, 228 Conn. 206, 222–23 (1994)).⁸

“The existence of a fiduciary duty is largely a factual determination and the extent of the duty and the resulting obligations may vary according to the nature of the relationship: the obligations do not arise as a result of labeling, but rather by analysis of each case.” Hoffnagle v. Henderson, No.CV020813972S, 2003 WL 21150549 (Conn.Super. April 17, 2003) (citing Konover Development Corp. v. Zeller, 228 Conn. 206 (1994)).

Plaintiff has specifically pled that both Beta Pharma and Zhang were partners with plaintiff in the Beta Pharma Canada venture. See paragraph 11 of the Fifth Count and paragraph 14 of the Eighth Count. Connecticut General Statutes §34-

⁸ The Connecticut Appellate Courts have not expressly limited breach of fiduciary duty causes of action to cases involving only fraud, self-dealing or conflict of interest, although the cases in which that doctrine has been invoked have involved such claims. See Di Teresi v. Stamford Health System, Inc., 142 Conn.App. 72, 94 (2013); Sherwood v. Danbury Hospital, 278 Conn. 163, 195 (2006).

301(6) defines a “Partnership Agreement” to mean “... the agreement, whether written, oral or implied, among the partners, concerning the partnership.” See also Bloom v. Miklovich, No. CV020198195S, 2004 WL 1558280, at *3 (Conn. Super. June 22, 2004) aff’d, 111 Conn. App. 323 (2008)). Indeed, “in Connecticut, there is no requirement that a general partnership be registered or have a written partnership agreement in order to maintain a valid legal existence and bring suit under the partnership name. General Statutes § 34–314(a) (“the association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership”); General Statutes § 34–313 (“[a] partnership is an entity distinct from its partners”); General Statutes § 34–328(a) (“[a] partnership may sue and be sued in the name of the partnership”); Jacobs v. Thomas, 18 Conn.App. 218, 222, 557 A.2d 145, cert. denied, 212 Conn. 806, 563 A.2d 1355 (1989) (existence and terms of oral partnership agreement is question of fact).” Allied Associates v. Q-Tran, Inc., No. CVBPSP1008075S, 2014 WL 4413785, at *2 (Conn. Super. July 29, 2014)).

It is well established under Connecticut law that partners owe a fiduciary duty to one another. “Our Supreme Court has recognized that partners are generally ‘bound in a fiduciary relationship and act as trustees toward each other and toward the partnership.’” Spector v. Konover, 57 Conn. App. 121, 127 (2000) (quoting Oakhill Associates v. D’Amato, 228 Conn. 723, 727)). See also Konover Development Corp. v. Zeller, 228 Conn. 206, 226 (1994) (holding that partners owe a fiduciary duty to other partners). Thus, plaintiff’s complaint clearly alleges that defendants Beta Pharma and Zhang, as plaintiff’s partners in the Beta Pharma Canada venture, owed a fiduciary duty to plaintiff.

Additionally, defendant Zhang was a fellow officer, director and stockholder with plaintiff in Beta Pharma Canada. See paragraph 14 of the Eighth Count. Under Connecticut law, “[a]n officer and director occupies a fiduciary relationship to the

corporation and its stockholders.” Pacelli Bros. Transportation, Inc. v. Pacelli, 189 Conn. 401, 407 (1983). See also Thames River Recycling v. Gallo, 50 Conn.App. 767, 781 (1998) (recognizing that a director or a corporation occupies a fiduciary relationship to the corporation’s stockholders). Accordingly, plaintiff’s allegations in the Eighth Count make clear that, as an officer and director of Beta Pharma Canada, defendant Zhang owed a fiduciary duty to plaintiff, a stockholder of that company.

This Court has also recognized that some business relationships can create a fiduciary duty between the parties to the relationship. In WEB Management LLC v. Arrowood Indemnity Co., No.3:07cv424(VLB), 2008 WL 619310 (D.Conn. March 5, 2008), plaintiff brought breach of fiduciary duty and CUTPA claims against defendant arising from an off-shore captive reinsurance program, under which plaintiff provided defendant with a letter of credit to secure the program. The terms of the parties’ agreement provided that defendant held exclusive authority to release the letter of credit. After conclusion of the reinsurance program, defendant Arrowood refused to release and return plaintiff’s letter of credit, arguing that it was legally entitled to apply it to unrelated losses.

Defendant Arrowood moved to dismiss plaintiff’s claims, in particular arguing that no fiduciary duty existed between the parties because they entered into “a run of the mill contractual relationship under which no fiduciary duty could exist as a matter of law.” Id. at *2. Plaintiff, however, contended that “the RAC program created a unique business relationship conferring a dominant position of authority on Arrowood and exclusive control over WEB’s property.” Id. This Court agreed with plaintiff. Specifically, the Court stated that, “[t]he law will imply fiduciary responsibilities only where one party to a relationship is unable to fully protect its interests or where one party has a high degree of control over the property or subject matter of another and the unprotected party has placed its trust and

confidence in the other.” Id. (quoting Hi-Ho Tower, Inc. v. Com-Tronics, Inc., 235 Conn. 20, 41 (2000)). The Court noted that plaintiff’s allegations demonstrated the parties’ agreement was structured such that Arrowood was placed in a uniquely dominant position over WEB and its property, and that WEB thus relied on Arrowood to protect its interests.

Accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in favor of plaintiff, this Court declined to dismiss WEB’s breach of fiduciary duty claim, reasoning that, “[t]he RAC program placed Arrowood in a uniquely dominant position over WEB’s property sufficient to create a fiduciary relationship between the parties.” Id. Thus, “WEB has pled sufficient facts to distinguish the RAC program from a generic contractual relationship and stated claims for breach of fiduciary duty” Id. at *4.

Similarly, the allegations in the Fifth and Eighth Counts of plaintiff’s complaint demonstrate that the agreement between plaintiff and defendants placed defendants in a uniquely dominant position over plaintiff given defendants’ relationships to ZBP, its stock, and its forthcoming initial public offering. In particular, plaintiff alleges that defendant Beta Pharma has a substantial ownership interest in ZBP, and that defendant Zhang was Vice-President of ZBP and one of its directors, placing plaintiff’s interest in ZBP within the control of defendants. This control is further demonstrated by plaintiff’s allegations in paragraph 13 of the Fifth Count, and paragraph 15 of the Eighth Counts. Indeed, defendants knew that the ZBP Board of Directors would not permit Beta Pharma to transfer shares to plaintiff, and would not recognize Beta Pharma’s transfer of shares. Moreover, defendants possessed but failed to share material inside information concerning the value of the shares, and knew that there was no independent market for these shares – information which gave defendants financial control over plaintiff’s earned shares of ZBP stock.

As in WEB Management, plaintiff has alleged sufficient facts in the Fifth and Eighth Counts of his complaint to distinguish the business relationship between the parties here from “a generic contractual relationship,” and to demonstrate that this relationship placed Beta Pharma and Zhang in uniquely dominant positions over plaintiff and his property sufficient to create a fiduciary relationship between them. Accordingly, defendant’s motion to dismiss plaintiff’s fiduciary duty claims should be denied.

Further, plaintiff’s allegations in the Fifth and Eighth Counts show that defendants Zhang and Beta Pharma acted as the agents of plaintiff with regard to purchase of ZBP stock and participation in its initial public offering. “‘An agent is someone who has been designated by another to act on its behalf and subject to its control. An agent is someone who is doing something at the behest and for the benefit of another.’” Doe ex rel. Doe v. Options Unlimited, Inc., No. CV135036891, 2014 WL 7525534 *5 (Conn. Super. Nov. 26, 2014) (quoting Sola v. Wal-Mart Stores, Inc., 152 Conn.App. 732, 746 (2014)). “‘Agency is defined as the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act...’” Id. (quoting LeBlanc v. New England Raceway, LLC, 116 Conn.App. 267, 274–75 (2009)).

In paragraphs 10, 12 and 13 of the Fifth Count, and paragraphs 10, 11, 12, and 13 through 15 of the Eighth Count, plaintiff has alleged that defendants Beta Pharma and Zhang acted as plaintiff’s agents with regard to plaintiff obtaining ZBP stock and participating in the initial public offering of ZBP, including dealing with ZBP’s Board of Directors on plaintiff’s behalf in connection with the stock offered to plaintiff.

In Metropolitan Enterprise Corp. v. United Technologies Intl. Corp., No.3:03cv1685(JBA), 2004 WL 1497545 (D.Conn. June 28, 2004), the court denied defendant's Rule 12(b)(6) motion to dismiss plaintiff's breach of fiduciary duty claim. Plaintiff entered into a written agreement with defendant under which defendant UTI employed the plaintiff to market, promote and sell UTI's jet engines to air carriers based in Taiwan. Plaintiff's breach of fiduciary duty allegations are similar to those made by plaintiff here:

Metropolitan's breach of fiduciary duty claim is based on the allegation that it acted as UTI's agent under the Agreement and that UTI, as its principal, breached its fiduciary duty to Metropolitan, as agent, by failing to act with sufficient care to prevent harm to Metropolitan, including failing to disclose material facts regarding its intentions with respect to the Agreement, failing to disclose its intent not to act in good faith in the commercial jet engine market, and otherwise failing to conduct itself in accord with the fiduciary duties of trust and confidence inherent in Metropolitan's and UTI's legal relationship.

Id. at *7.

The court concluded that those allegations sufficiently stated a claim for breach fiduciary duty: "Metropolitan's allegations fairly give UTI notice of its breach of fiduciary duty claim as arising from the relationship formed by execution of the Agreement, the actions of UTI generally said to manifest intent and control, and Metropolitan's acceptance of the undertaking." Id. at *8. Reasoning that, "[g]iven that the existence of an agency relationship is a highly factual inquiry....," the court denied dismissal. The court's decision in Metropolitan Enterprise Corp is instructive on these facts, and plaintiff respectfully submits that defendants' motion should similarly be denied.⁹

⁹ It should also be noted that, in some employer-employee relationships, a fiduciary duty is created. Hoffnagle, 2003 WL 21150549 at *6; Ochieke v. Turbine Controls, Inc., No. HHDCV105035041, 2014 WL 6427476 (Conn.Super. Oct. 8, 2014) (concluding that employment contract-based employees and employers can have fiduciary duties); Seymour Ambulance v. Marcucio, No. CV054002561S, 2005 WL 3371991 (Conn.Super. Nov. 23, 2005) (recognizing that whether a fiduciary relationship exists on the basis of an employer-employee relationship is a question of fact); Esposito v.

For the foregoing reasons, defendants' motion should be denied because plaintiff has alleged sufficient facts to demonstrate that defendants owed a fiduciary duty to plaintiff.

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Connecticut College, No. 543055, 1999 WL 81305 (Conn.Super. Feb. 10, 1999)
(same).

CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2015, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

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